

International Courts and Tribunals and the Independence of the International Judge*

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I. INTRODUCTION

This Essay explores a theme familiar in domestic law that is relatively uncharted in relation to international courts and tribunals—judicial independence. The context for our analysis is the growth of an international judiciary. Over the last decade or so, almost a dozen new standing international courts or tribunals have been established,¹ and the scope of judicial activity at the international level has expanded far beyond what might have been envisioned just fifteen or twenty years ago. There are more judges, the range of specialized tribunals addressing specific substantive areas of law has increased, and the range of remedies available has broadened. In some areas, judicial settlement of international disputes is no longer out of the ordinary.

Modern international courts and tribunals are diverse in their mandates, structure, and organization.² International judges are subject to varying means of appointment and to differing terms and conditions of service (e.g., tenure and permissible scope of outside activities). Yet they share a common characteristic insofar as they all at least potentially play a central role in interpreting and applying international law. Judicial independence is recognized to be a significant factor in maintaining the credibility and legitimacy of international courts and tribunals. In this Essay we sketch the growth of the international judiciary and highlight certain issues and questions relating to independence and impartiality that are being raised. At least two

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1. Cesare P.R. Romano, *The Proliferation of International Judicial Bodies: The Pieces of the Puzzle*, 31 N.Y.U. J. INT'L L. & POL. 709, 710, 711–23 (1999).

2. See generally PHILIPPE SANDS ET AL., *MANUAL ON INTERNATIONAL COURTS AND TRIBUNALS* (1999).

concerns familiar at the national level have emerged in the international context: first, avoiding the appearance of bias by judges in international courts and tribunals; and second, ensuring the independence of international courts and tribunals from political organs. Given the new context within which international courts and tribunals operate, and the emerging commonalities between them, it may be appropriate to consider developing a set of guidelines for addressing the independence of the international judiciary.

II. THE GROWTH OF THE INTERNATIONAL JUDICIARY

The emergence of an “international judiciary” is a relatively recent development. The first efforts to establish a standing international court occurred in the 1890s. They foundered for the simple reason that the states involved in the diplomatic negotiation of the Hague Peace Conference of 1899 could not agree on the method of appointing the judges. This disagreement centered on the proper balance between the desire of every participating state to have a judge on the court, on the one hand, with the need for a tribunal of manageable proportions, on the other hand.

The first international court—the Central American Court of Justice—was established in 1907 and was composed of a small enough number of states to avoid the obstacle on which the Hague discussions foundered. Due to its small size, each participating state was permitted a judge on the bench. While the original Central American Court of Justice was short lived, the intimate connection between the states party to the instrument establishing this international court and the provenance, number, and identity of the judges, with all that these factors imply for judicial independence, remains a live issue today.

The next international court to be established was the Permanent Court of International Justice in 1922, in The Hague. It was succeeded by the International Court of Justice (ICJ) in 1946, with the creation of the United Nations. The ICJ was, and remains, the “principal judicial organ of the United Nations.”³

Until the late 1950s, the ICJ and its fifteen judges had a virtual monopoly on the judicial resolution of international disputes. However, the number of international courts has since increased markedly.⁴ Beyond the ICJ there are now a wide range of tribunals with jurisdiction over particular subject matters. International courts organized by subject matter include the International Tribunal for the Law of the Sea (ITLOS) (twenty-one judges);⁵ as well as the regional human rights bodies in Europe (forty-one judges),⁶

3. *Id.* at 4.

4. See generally sources cited *supra* notes 1–2.

5. UNITED NATIONS CONVENTION ON THE LAW OF THE SEA, art. 2, Annex VI, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

6. Council of Europe, EUROPEAN CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS, art. 20, Nov. 4, 1950, ETS No. 5, 213 U.N.T.S. 222 [hereinafter ECHR].

the Americas (seven judges),⁷ and prospectively, Africa (eleven judges).⁸ Numerous regional courts now exist within regional economic arrangements; notably, the European Court of Justice and Court of First Instance (thirty judges in all),⁹ and similar bodies established in parts of Africa (seven judges),¹⁰ Latin America (five judges),¹¹ and Central America (six judges).¹² The World Trade Organization's (WTO) Dispute Settlement Body provides for the resolution of international trade disputes by dispute settlement panels with appeals on points of law to a seven-member Appellate Body.¹³

In the burgeoning field of international criminal law, there are the ad hoc international criminal tribunals for the former Yugoslavia (ICTY)¹⁴ and for Rwanda (ICTR)¹⁵ (sixteen judges each, including a shared seven member Appeals Chamber), and the International Criminal Court (ICC) (with eighteen judges).¹⁶ Moreover, "hybrid" ad hoc tribunals that exhibit both national and international characteristics (and include both national and international judges) have been established to deal with the aftermaths of specific conflicts, for example in Sierra Leone.¹⁷

A broad definition of the international judiciary encompasses the standing arbitration institutions, such as the World Bank's International Center for the Settlement of Investment Disputes (ICSID),¹⁸ which provides for arbitration of disputes between foreign investors and host states. Also in this category are the Inspection Panels at various multilateral development

("The Court shall consist of a number of judges equal to that of the High Contracting Parties."). At present, there are 41 judges on the court. See SANDS ET AL., *supra* note 2, at 201.

7. STATUTE OF THE INTER-AMERICAN COURT ON HUMAN RIGHTS, art. 4, O.A.S. Res. 448 (IX-0/79) (1980).

8. PROTOCOL TO THE AFRICAN CHARTER ON HUMAN AND PEOPLE'S RIGHTS ON THE ESTABLISHMENT OF AN AFRICAN COURT ON HUMAN AND PEOPLE'S RIGHTS, art. 11(1), June 9, 1998, OAU Doc. OAU/LEG/EXP/AFCHPR/PROT (III), *reprinted in* 9 AFR. J. INT'L & COMP. L. 953 (1997) [hereinafter ACHPR PROTOCOL].

9. See SANDS ET AL., *supra* note 2, at 126, 146.

10. TREATY ESTABLISHING THE COMMON MARKET FOR EASTERN AND SOUTHERN AFRICA, art. 20, Nov. 5, 1993, 33 I.L.M. 1067 (1994).

11. TREATY CREATING THE COURT OF JUSTICE OF THE CARTEGENA AGREEMENT, art. 6, Mar. 10, 1996, 18 I.L.M. 1203.

12. AGREEMENT OF THE STATUTE OF THE CENTRAL AMERICAN COURT OF JUSTICE, art. 8, Dec. 10, 1992, 34 I.L.M. 921 (1995).

13. UNDERSTANDING ON RULES AND PROCEDURES GOVERNING THE SETTLEMENT OF DISPUTES, Apr. 15, 1994, MARRAKESH AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION, annex 2, art. 17, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND, vol. 31, 33 I.L.M. 1263 (1994) [hereinafter DSU].

14. THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA, May 25, 1993, 32 I.L.M. 1192 (1993).

15. THE STATUTE OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR RWANDA, Nov. 8, 1994, 33 I.L.M. 1598 (1994).

16. ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT, art. 36(1), July 17, 1998, U.N. Doc. 32A/CONF.183/9, 37 I.L.M. 208 (1998) [hereinafter ICC STATUTE].

17. AGREEMENT BETWEEN THE UNITED NATIONS AND THE GOVERNMENT OF SIERRA LEONE, Jan. 16, 2002, U.N. Doc. S.2002.915 (2002).

18. CONVENTION FOR THE SETTLEMENT OF INVESTMENT DISPUTES BETWEEN STATES AND NATIONALS OF OTHER STATES, Mar. 18, 1965, 17 U.S.T. 1270, 575 U.N.T.S. 159 [hereinafter ICSID].

banks, which provide for administrative review of lending decisions and the international Administrative Tribunals, which resolve disputes between employees and the multilateral development banks for which they work.¹⁹

Among the standing, permanent bodies there are now some 200 international judges. Compared to most national legal systems, this number is small. However, these permanent international judges are supplemented by ad hoc judges, as well as by arbitrators appointed to arbitral tribunals established to deal with particular disputes. Ad hoc judges may be appointed in some courts by states involved in a case that have no national on the bench. More recently, the Security Council has mandated the establishment of pools of *ad litem* judges for the ICTY and the ICTR, in order to assist those tribunals in dealing with their caseload within a reasonable period of time.²⁰ Such ad hoc and “contingent” appointments can add further complexity to the issue of judicial independence.

III. INDEPENDENCE OF THE INTERNATIONAL JUDGE

The expanding function of the international judiciary has attracted public attention as demonstrated by the coverage of the Milosevic trial in the ICTY, the debates around the United States’ attitude toward the ICC, and the degree of press coverage of actual or potential trade disputes in the WTO. The international judges exercise an avowedly judicial function on a wide range of socially, politically and economically sensitive topics.²¹ As the reach of international courts and tribunals expands, efforts to evaluate their credibility, legitimacy, and efficacy will likely increase. Independence of the judiciary is a critical factor in this evaluation.²² Are the international tribunals and their judges to be seen as impartial dispensers of justice, handing down rule-

19. See generally DOCUMENTS ON INTERNATIONAL ADMINISTRATIVE TRIBUNALS (Chittharanjan F. Amerasinghe ed., 1989).

20. S.C. Res. 1329, U.N. SCOR, 55th Sess., 4240th Mtg., Annex I, U.N. Doc. S/RES/1329 (2000) [hereinafter INTERNATIONAL TRIBUNALS RESOLUTION]; S.C. Res. 1431, U.N. SCOR, 57th Sess., 4601st Mtg., U.N. Doc. S/RES/1431 (2002).

21. A number of recent cases illustrate this point. In 2002, the European Court of Human Rights found that the United Kingdom had violated, inter alia, the right to privacy under article 8 of the ECHR by not allowing a transsexual person to change the gender on her birth certificate (and to marry), and should review its national law accordingly. *Goodwin v. United Kingdom*, 366 Eur. Ct. H.R. (2002). The ICJ has sought to intervene in executions in the United States pending its consideration of alleged violations of the Vienna Convention on Consular Relations. See *Request for the Indication of Provisional Measures, Case Concerning the Vienna Convention on Consular Relations (Para. v. U.S.)*, 1998 I.C.J. 248 (Apr. 9); *Request for the Indication of Provisional Measures, LaGrand Case (Germany v. United States)*, 1999 I.C.J. 9 (Mar. 3). Additionally, ITLOS has been asked to order an interim injunction on the operation of a facility for reprocessing spent nuclear fuel in the United Kingdom. See *Request for Provisional Measures, The MOX Plant Case (Ir. v. U.K.)*, 2001 ITLOS No. 10 (Dec. 3). Alongside these high-profile cases are the extensive and now widely publicized activities of the ICTY, ICTR, and the WTO’s panels and Appellate Body. See generally ICTY Web site, <http://www.un.org/icty>; ICTR Web site <http://www.un.org/icty>; WTO Web site <http://www.wto.org>.

22. Shimon Shetreet, *Judicial Independence: New Conceptual Dimensions and Contemporary Challenges*, in JUDICIAL INDEPENDENCE: THE CONTEMPORARY DEBATE 590, 593 (Shimon Shetreet & Jules Deschenes eds., 1985) [hereinafter JUDICIAL INDEPENDENCE].

based decisions; or are they merely another manifestation of state power and influence in international relations? Do international tribunals and judges conform to the notions of independence familiar in national legal systems?

Challenges to judicial process based on an alleged lack of independence or impartiality are already being raised in international fora, for example in former President Milosevic's denunciations of the ICTY, and the formal appeal in the *Furundzija* case in the ICTY.²³ In some respects, these developments could be a sign of the maturation of the international judicial system, as the system begins to exhibit the traits and adhere to the same standards of fairness and impartiality of domestic systems. However, they also represent a challenge.

Judges in every international court and tribunal must be "independent" and "impartial." The statutes and rules of the various tribunals address the issue, at least in general terms, by setting out the criteria for qualification as a judge and the requirements of independence and impartiality (such as restrictions on outside activities).²⁴ In many cases these general formulations are supplemented by more detailed rules guiding, for example, when judges ought to recuse themselves.²⁵ In some cases, international courts have extremely strict rules prohibiting all forms of outside activity as a means of ensuring independence. In other cases, the guidelines are more flexible. Although the formulations and practices vary, the rules demonstrate a general commitment to independence and impartiality. *Prima facie*, the concept of judicial independence applies to international judges.

At the national level, the legitimacy and authority of the courts is tied to their independence. However, it is less apparent what the meaning of independence and impartiality in the context of the international courts should be. The idea of judicial independence is culture specific. But should the independence of a judge at the ICJ be measured by the standards of his or her domestic jurisdiction, the standards of the ICJ, or to some international minimum standard? If international norms exist or emerge, might they influence the content and application of—and perhaps even weaken—national standards? Should national courts give effect to international judicial decisions and rules that have been developed by judges who are not independent according to certain domestic standards?²⁶ A fundamental issue underlies all of these questions. Is it appropriate to treat the independence of

23. *Prosecutor v. Furundzija*, Case No. IT-95-17/1A, Judgment (July 21, 2000). See *infra* text accompanying note 43.

24. See, e.g., ICC STATUTE, *supra* note 16, art. 40(2) ("Judges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence.").

25. See, e.g., UNCLOS, *supra* note 5, art. 7(1) ("No member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.").

26. This question is significant given that the standards governing judicial independence in common law countries differ markedly from the Roman, civil law, and Islamic traditions. The common law approach will often find itself in a minority on the international bench.

the international judiciary as one would that of national judges, or is there something qualitatively different about international law and courts (i.e., the popular refrain that international justice is merely international politics writ large) such that different (lesser) standards should apply in the international setting?

These and other questions are part of a research agenda which has only recently begun to be addressed.²⁷ Relatively little has been written on the subject of the independence of the international judiciary.²⁸ However, the international community is concerned with the independence of the *national* judiciary. A number of international documents propose standards for the independence of national judges.²⁹ Moreover, the very existence of a Special Rapporteur on the Independence of Judges and Lawyers suggests that independence of the national judiciaries is seen as a matter of legitimate concern for the international community. In addition, one of the initiatives to develop international standards on judicial independence incorporates a section specifically addressing international judges.³⁰

In the international context, as in the domestic, judicial independence has numerous dimensions.³¹ A few of these dimensions are introduced below, including the procedures for the nomination, selection, and re-election of international judges; the relationship between the international judge and the parties or issues before the court the outside activities of international judges; and finally, the relationship between judicial and political organs.

IV. THE NOMINATION, SELECTION AND TENURE OF JUDGES

As the scope of the international judicial function widens, the demand for information about the identity of international judges and the means of

27. For example, in 2001, the ILA established a Study Group on the Practice and Procedures of International Courts and Tribunals. At its first meeting in February 2002, the Study Group decided first to consider the independence of the international judiciary. See Study Group on the Practice and Procedures of International Courts and Tribunals, *Report of the First Meeting of the ILA Study Group on the Practice and Procedures of International Courts and Tribunals* (Feb. 2, 2002), http://www.ucl.ac.uk/laws/cict/docs/rpt_2feb02.pdf.

28. See, e.g., L.E. Petteti, *Independence of International Judges*, in JUDICIAL INDEPENDENCE, *supra* note 22, at 496; D. Shelton, *The Independence of International Tribunals*, in THE MODERN WORLD OF HUMAN RIGHTS: ESSAYS IN HONOR OF THOMAS BUERGENTHAL 299 (Antonio Augusto Cancado Trindade ed., 1996); Detlev Vagts, *The International Legal Profession: A Need for More Governance?*, 90 AM. J. INT'L L. 250 (1996).

29. See, e.g., U.N. Basic Principles on the Independence of the Judiciary, G.A. Res. 146, U.N. GAOR, 40th Sess., Supp. No. 53, U.N. Doc. A/RES/40/146 (1985). See generally JUDICIAL INDEPENDENCE, *supra* note 22 (containing a number of international documents regarding the independence of the judiciary); and N.J. Miller, *Independence in the International Judiciary: General Overview of the Issues* (Feb. 2002) (draft paper prepared for the meeting of the Study Group of the ILA), <http://www.ucl.ac.uk/laws/cict>.

30. See First World Conference on the Independence of Justice, Montreal, June 10, 1983, *Universal Declaration on the Independence of Justice*, sec. 1 (1983), reprinted in JUDICIAL INDEPENDENCE, *supra* note 22, at 447.

31. See, e.g., Robert O. Keohane et al., *Legalized Dispute Resolution: Interstate and Transnational*, in LEGALIZATION AND WORLD POLITICS 73, 75–78 (Judith Goldstein et al. eds., 2001); Shetreet, *supra* note 22, at 598; Pettiti, *supra* note 28, at 497.

their appointment is gradually growing, among scholars as well as among the public and private interests directly or potentially affected by international judicial decisions.³² As at the national level, the issue becomes one of legitimate public interest.

As noted above, the statutes and rules of international courts and tribunals tend to include general provisions as to qualifications for judicial appointment.³³ Beyond these formal requirements, how are international judges actually appointed? In practice, the nomination and election of judges to international courts and tribunals are politicized processes, subject to little

32. Keohane et al. *supra* note 31, at 76–77 (Stating that independent selection and tenure is the most important criterion for the independence of an international tribunal).

33. For example, the ICJ Statute provides that

[t]he Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

STATUTE OF THE INTERNATIONAL COURT OF JUSTICE, June 26, 1945, art. 2, Stat. 1055, 33 U.N.T.S. 993, [hereinafter ICJ STATUTE].

The seven members of the WTO Appellate Body are to be

persons of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally. They shall be unaffiliated with any government.

The Appellate Body membership shall be broadly representative of membership in the WTO.

DSU, *supra* note 13, art. 17.

The ICC Statute contains more detailed, multi-layered provisions on the qualifications and composition of the Bench:

(a) The judges shall be chosen from among persons of high moral character, impartiality and integrity who possess the qualifications required in their respective States for appointment to the highest judicial offices.

(b) Every candidate for election to the Court shall:

(i) Have established competence in criminal law and procedure, and the necessary relevant experience, whether as judge, prosecutor, advocate or in other similar capacity, in criminal proceedings; or

(ii) Have established competence in relevant areas of international law such as international humanitarian law and the law of human rights, and extensive experience in a professional legal capacity which is of relevance to the judicial work of the Court;

(c) Every candidate for election to the Court shall have an excellent knowledge of and be fluent in at least one of the working languages of the Court.

ICC STATUTE, *supra* note 16, art. 36(3).

Additionally, the ICC STATUTE provides that:

(a) The States Parties shall, in the selection of judges, take into account the need, within the membership of the Court, for:

(i) The representation of the principal legal systems of the world;

(ii) Equitable geographical representation; and

(iii) A fair representation of female and male judges.

(b) States Parties shall also take into account the need to include judges with legal expertise on specific issues, including, but not limited to, violence against women or children.

Id. art. 36(8).

Arbitrators appointed under the ICSID arbitration rules are persons “who may be relied upon to exercise independent judgment,” and may be disqualified if they do not meet this standard. ICSID, *supra* note 18, art. 14.

transparency, and to widely varying level nomination mechanisms at the national level.

Candidates for international judicial office are put forward by states. A state nominates or appoints individuals to international judicial office knowing that the judge may be involved in deciding a contentious case that implicates its national interests. It would be unreasonable to expect that a nominating or appointing state would not put forward as a candidate a person who shares (in general terms) the value systems of the nominating state. But how far is a state entitled to go in ensuring the nomination of a “safe pair of hands”? At what point should a prior relationship between a potential judge and the nominating state preclude appointment? These questions arise because many states’ candidates for international judgeships will have been former ministers or legal advisers, former members of the diplomatic corps, or even former parliamentarians of the nominating state. Some will have had no judicial or courtroom experience.

Another nomination and selection issue worthy of attention is the relatively low number of female judges on international courts and tribunals and the extent to which this is a result of nomination procedures at the national level.³⁴ While some argue that this is merely a result of historical factors that will gradually change over time, some tribunals have made specific provisions to ensure fair representation of male and female judges.³⁵

Although the appointment process of the international judges varies from body to body, the general approach is similar. Each of the states involved in the appointment process is entitled to nominate a single candidate,³⁶ who is then subject to an election process along with the other nominees. In the case of the ICJ, the fifteen judges are elected by the U.N. General Assembly and Security Council for a renewable term of nine years. No two judges may have the nationality of the same state, and the entire bench is to represent the main forms of “civilization” (as described by article nine of the court’s statute) and principal legal systems. In practice, the five permanent members of the Security Council always have a judge—an unwritten custom which may raise issues about judicial independence. The other ten judges comprise two from each of the five regional groupings in the U.N. system.

Elections to the ICJ are highly politicized. Without the support of any influential states, the electoral prospects for any candidate would be slim. The electoral process involves formal and informal meetings between the candidates and diplomatic representatives of U.N. members. The state pro-

34. See Jan Linehan, Project on International Courts and Tribunals and Matrix Chambers, *Women and Public International Litigation* (July 13, 2001), <http://www.pict-pecti.org/publications/publications.html>.

35. See, e.g., ICC STATUTE, *supra* note 16, art. 36(8)(a)(iii); EUROPEAN COURT OF HUMAN RIGHTS: RULES OF COURT, rule 14 (last amended Nov. 1, 1998), 38 I.L.M. 208 (1999); ACHPR PROTOCOL, *supra* note 8, art. 12(2).

36. An exception is the ECHR, where the 41 states involved put forward three candidates, who are then assessed and voted upon by the Parliamentary Assembly of the Council of Europe, and one is elected by the Parliamentary Assembly. ECHR, *supra* note 6, art. 19.

posing a candidate will use its clout to promote the candidate.³⁷ Elections involving judges standing for reelection can focus on cases decided by the judge. This practice raises many eyebrows. But is there any evidence that it leads to a more or less independent judiciary than, say, the electoral process for state judges in the United States?

At its first session in September 2002, the Assembly of States Parties to the Statute of the ICC considered the nomination and election process for judges of the ICC. The ICC Statute contains relatively detailed, tiered requirements for the composition and qualifications of the bench.³⁸ One aspect of the election process which has attracted interest is the possibility in the ICC Statute for the establishment of an Advisory Committee to review nominations.³⁹ The establishment of this committee gained little support in practice and will not be utilized, at least in the first elections. Nonetheless, this mechanism for an independent review and assessment of nominations provides an interesting model for other international courts and tribunals.⁴⁰

The statutes and rules of the various courts and tribunals generally provide that once elected, international judges can only be removed by the court itself. In this respect, tenure is not subject to political interference. However, it is noteworthy that international judges generally hold office for relatively short periods in comparison to national judges, even though their terms are often renewable by reelection. For example, the term of office on the ICJ and on ITLOS is nine years;⁴¹ the term of office on the ECHR and ECJ is six years.⁴² The length of tenure, coupled with the political nature of the election and reelection process, raises the question of whether individual judges are influenced by the need to secure reelection, particularly toward the end of their term. Would appointment until a specified retirement age enhance judicial independence? Longer terms of office may raise concerns about the representativeness of international courts: rotation and reelection requirements may serve the interest of all states that want to have their nationals or nominees appointed to the bench. However, this concern itself is difficult to reconcile with the concept of judicial independence.

37. If it does not, the candidate will be perceived not to have the support of the state, which could jeopardize the candidacy, as the recent reelection of Judge Mumba (Zambia) to the ICTY demonstrates. See Press Release, U.N. General Assembly, *General Assembly Elects 14 Judges to Tribunal for Former Yugoslavia*, Mar. 14, 2001, U.N. Doc. GA/9859 (2001) (after seven rounds of voting, the General Assembly reelected Judge Mumba, filling the final vacancy on the court).

38. See *supra* note 33. Nominations for the ICC are open until November 30, 2002, and the election of the first eighteen judges will take place at the resumed first session in February 2003. See the ICC Web site for more information at <http://www.un.org/law/icc>.

39. ICC STATUTE, *supra* note 16, art. 36(4)(c).

40. See Thordis Ingadottir, *The International Criminal Court Nomination and Election of Judges*, § 4.6 (June 4, 2002), <http://www.pict-pcti.org/publications/publications.html>.

41. See ICJ STATUTE, *supra* note 33, art. 13(1); UNCLOS, *supra* note 5, art. 5(1).

42. See ECHR, *supra* note 6, art. 23(1); SANDS ET AL., *supra* note 2, at 126.

V. PRIOR INVOLVEMENT WITH THE PARTIES OR WITH AN ISSUE
BEFORE THE TRIBUNAL

Prior involvement of a judge either with a party before the court or an issue before the court might give rise to a challenge on the grounds of bias or the appearance of bias. In international tribunals, the issue is complicated by the relatively small world of international law: a judge on an international court may have acted in the past as counsel before the same tribunal, or may have acted as an advisor to one of the parties before the tribunal; she may have served as a diplomat dealing with issues which subsequently come before the court; or she may have expressed views in academic writings on issues directly relevant to the case. The statutes and rules of the various courts and tribunals address these issues to varying degrees. In some cases the need for recusal will be clear, but in others it will be less so.

There is at least one recent example of an appeal against an international judicial decision based on the appearance of bias. In the *Furundzija* appeal before the ICTY, the defendant sought the disqualification of Judge Mumba and the vacation of the judgment and sentence. The defendant's complaint was based on Judge Mumba's involvement with the U.N. Commission on the Status of Women, which had dealt, inter alia, with allegations of systematic rape in the former Yugoslavia. Associations between the judge, the prosecutor, and amici curiae in the case were also raised. After reviewing national jurisprudence, the Appeals Chamber of the ICTY set out the following principles for interpreting and applying the impartiality requirements of the ICTY:

- A. A Judge is not impartial if it is shown that actual bias exists.
- B. There is an unacceptable appearance of bias if:
 - (i) a Judge is a party to the case, or has a financial or proprietary interest in the outcome of a case, or if the Judge's decision will lead to the promotion of a cause in which he or she is involved, together with one of the parties. Under these circumstances, a Judge's disqualification from the case is automatic; or
 - (ii) the circumstances would lead a reasonable observer, properly informed, to reasonably apprehend bias.⁴³

In relation to "reasonable observer" standard in B(ii), the Appeals Chamber adopted the approach that the "reasonable person must be an informed person, with knowledge of all the relevant circumstances, including the traditions of integrity and impartiality that form a part of the background and apprised also of the fact that impartiality is one of the duties that Judges swear to uphold."⁴⁴ Interestingly, the Appeals Chamber noted that the in-

43. See *Furundzija*, *supra* note 23, ¶ 189.

44. *Id.* ¶ 190.

formation on which the appellant relied was in fact in the public domain—in Judge Mumba’s biography available in the ICTY’s Yearbook—and that the appellant could have raised this issue before the Trial Chamber, rather than on appeal.⁴⁵ The Appeals Chamber found no appearance of bias in the circumstances of the case, rightly in our view.⁴⁶

More recently, an appearance of bias challenge arose in WTO panel proceedings based on the views of a panelist in an article concerning a separate dispute between the same parties.⁴⁷ Indeed, the panel system of the WTO Dispute Settlement Understanding has been the subject of some concern with respect to conflicts of interest. In the ongoing negotiations on the review of the Dispute Settlement Understanding, a proposal has been made to shift to a system of permanent panelists with non-renewable fixed terms which would avoid conflicts of interest.⁴⁸ Additionally, greater transparency in the panel system would be desirable.

In the context of the ICJ, concerns have been raised about the appearance of counsel before the court who are or have served on the bench as ad hoc judges. In order to address these issues surrounding ad hoc judges, as well as former judges and court staff, the ICJ recently adopted two Practice Directions.⁴⁹ These Practice Directions are a useful starting point in providing more detailed guidance on how to address issues of independence and impartiality.

45. *Id.* ¶ 173–74.

46. *Id.* ¶ 215.

47. Susan Esserman & Robert Howse, *Trade Disputes Require Fairer Arbitration* (Sept. 12, 2002), <http://www.ft.com>.

48. For an example of a proposal to revise the system of panelists for WTO disputes, see generally, WTO Dispute Settlement Body Report, *Contribution of the European Communities and Its Member States to the Improvement of the WTO Dispute Settlement Understanding*, WTO Doc. TN/DS/W/1 (Mar. 13, 2002) [hereinafter, *Contribution of the European Communities*].

49. The Practice Directions state:

Practice Direction VII

The Court considers that it is not in the interest of the sound administration of justice that a person sit as judge ad hoc in one case who is also acting or has recently acted as agent, counsel or advocate in another case before the Court. Accordingly, parties, when choosing a judge ad hoc pursuant to Article 31 of the Statute and Article 35 of the Rules of Court, should refrain from nominating persons who are acting as agent, counsel or advocate in another case before the Court or have acted in that capacity in the three years preceding the date of the nomination. Furthermore, parties should likewise refrain from designating as agent, counsel or advocate in a case before the Court a person who sits as judge ad hoc in another case before the Court.

Practice Direction VIII

The Court considers that it is not in the interest of the sound administration of justice that a person who until recently was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court (principal legal secretary, first secretary or secretary), appear as agent, counsel or advocate in a case before the Court. Accordingly, parties should refrain from designating as agent, counsel or advocate in a case before the Court a person who in the three years preceding the date of the designation was a Member of the Court, judge ad hoc, Registrar, Deputy-Registrar or higher official of the Court.

International Court of Justice, Practice Directions (Feb. 7, 2002), <http://www.icj-cij.org/icjwww/basicdocuments.htm>.

VI. OUTSIDE ACTIVITIES

A third aspect related to the independence of the international judiciary concerns the permissibility of “outside activities.” At the national level—certainly in the United States and the United Kingdom—it is well-established that any person holding judicial office cannot engage in, or receive remuneration for, outside activities.⁵⁰ The concern here is two-fold: first, the outside activities of judges may give rise to the appearance of bias in judicial proceedings; second, outside activities may simply compete for the time of judges and thus interfere with the work of the court or tribunal.

The statutes and rules of the international tribunals generally address the issue of outside activities of judges. However, they vary as to the degree of restriction on such activities. For example, the ICJ Statute provides that “[n]o member of the Court may exercise any political or administrative function, or engage in any other occupation of a professional nature.”⁵¹ During their term of office, judges of the ECHR “shall not engage in any activity which is incompatible with their independence, impartiality or with the demands of a full-time office.”⁵² The Statute of ITLOS provides that “[n]o member of the Tribunal may exercise any political or administrative function, or associate actively with or be financially interested in any of the operations of any enterprise concerned with the exploration for or exploitation of the resources of the sea or the seabed or other commercial use of the sea or the seabed.”⁵³ The ICC Statute provides that “[j]udges shall not engage in any activity which is likely to interfere with their judicial functions or to affect confidence in their independence,” and that “[j]udges required to serve on a full-time basis at the seat of the Court shall not engage in any other occupation of a professional nature.”⁵⁴

Thus, some international courts prohibit such activities, while others are more flexible. In the case of ITLOS, it is perhaps appropriate that some of the judges should continue to hold teaching positions, or even consult in matters entirely unrelated to the law of the sea. ICJ judges are full-time, but the ICJ has taken a flexible attitude with regard to certain outside activities. For example, some of the judges have accepted appointments to act as arbitrators, a practice that began in the 1970s when the ICJ was not very busy. Now that the ICJ has a relatively full docket, the practice may still raise concerns where the arbitral dispute is between two states that are not involved in proceedings before the ICJ. However, the possibility remains that

50. See, e.g., Lord Chancellor's Department, Guidance on Outside Activities and Interests, June 2000, <http://www.lcd.gov.uk/judicial/geninf/joutactfr.htm>; Admin. Office of the U.S. Courts, Code of Conduct for United States Judges, <http://www.uscourts.gov/guide/vol2/ch1.html>.

51. ICJ STATUTE, *supra* note 33, art. 16.

52. ECHR, *supra* note 6, art. 21(3).

53. UNCLOS, *supra* note 5, art. 7.

54. ICC STATUTE, *supra* note 16, art. 40.

one or more of the parties may become involved in proceedings before the ICJ, perhaps even while the arbitration is ongoing.

The appointment of part-time, and more recently of *ad litem*, judges has been viewed as an expedient and cost-effective solution to addressing the variable case load of international courts and tribunals. For example, in the early years of its existence the case load of ITLOS has been light; thus allowing judges to undertake other activities is sensible.⁵⁵ By contrast, the ICTY and the ICTR both face a demanding caseload and a tight schedule for their decisions⁵⁶ imposed by rights to fair trial and reasonable periods of detention. To ease this burden on ad hoc criminal tribunals, the Security Council has seen fit to create pools of *ad litem* judges, appointed for non-renewable four-year terms.⁵⁷ Only a limited number of *ad litem* judges may be utilized by the tribunals at any one time.⁵⁸ Part-time and *ad litem* judges clearly cannot be subject to the same constraints on outside activities as full-time judges, which raises questions as to *which* activities are appropriate. These issues will also arise for the ICC, which will have only nine full-time judges, with the rest appointed on a part-time basis, at least initially.⁵⁹

VII. RELATIONS BETWEEN JUDICIAL ORGANS AND POLITICAL ORGANS

A fourth issue concerns the relationship between the judiciary, on the one hand, and the legislature and executive, on the other. A considerable body of literature has been written about the proper relationship between the ICJ and the Security Council.⁶⁰

However, the issue is not limited to the ICJ. The issue of whether private parties should be allowed to submit amicus curiae briefs has created tension between the political and judicial organs of the WTO. The WTO dispute settlement rules are silent on the question of amicus briefs from parties such

55. UNCLOS, *supra* note 5, art. 41(2).

56. *See, e.g.*, President of the International Tribunal, *Ninth Annual Report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. Doc. A/57/150 (2002) (reporting that the court is currently operating at "full capacity," and closed 2010 cases between August 1, 2001 and July 31, 2002); President of the International Tribunal for Rwanda, *Seventh Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Genocide and Other Serious Violations of International Humanitarian Law committed in the Territory of Rwanda and Rwandan Citizens Responsible for Genocide and Other Such Violations Committed in the Territory of Neighbouring States between 1 January and 31 December 1994*, ¶ 1 U.N. Doc. A/57/Rev.1 (2002) (reporting that "the Trial Chambers are fully engaged . . . and therefore cannot undertake any new trials").

57. *See, e.g.*, INTERNATIONAL TRIBUNALS RESOLUTION, *supra* note 20.

58. *Id.*

59. ICC STATUTE, *supra* note 16, art. 35(3). *See also* Ingadottir, *supra* note 40, § 2 (explaining the motivations behind the combination of full and part-time judges).

60. In particular, on whether the ICJ may judicially review one or more decisions of the Security Council in the context of sanctions imposed against Libya following the Lockerbie incident. *See, e.g.*, Vera Gowlland-Debbas, *The Relationship Between the International Court of Justice and the Security Council in the Light of the Lockerbie Case*, 88 AM. J. INT'L L. 643 (1993); Eric Zübel, *The Lockerbie Controversy: Tension Between the International Court of Justice and the Security Council*, 5 ANN. SURV. INT'L & COMP. L. 259 (1999).

as non-governmental organizations or corporations.⁶¹ After several attempts by such entities to submit amicus briefs in panel and appellate proceedings, in May 2000 the WTO Appellate Body interpreted the silence of the rules as an indication that states had not intended to prohibit amicus briefs, and allowed two trade associations to file amicus briefs.⁶² Later in 2000, in anticipation of a number of amicus submissions in the *Asbestos* case,⁶³ the Appellate Body adopted, pursuant to article 16(1) of its Working Procedures, an additional procedure setting out guidelines for applications to submit amicus briefs.⁶⁴ The following month it received applications from seventeen interested parties to file such briefs in the *Asbestos* dispute. However, between the date of receipt of the applications and the Appellate Body's decision on whether to receive amicus briefs, many member states strongly criticized the Appellate Body's guidelines and its interpretation of the rules to permit amicus interventions (the United States was alone in supporting the Appellate Body's guidelines and decisions), on the grounds that the Body had exceeded its judicial function and had acted legislatively.⁶⁵ The Appellate Body rejected all seventeen applications because they did not comply with the requirements set forth in the additional working procedures.⁶⁶ For several independent observers, the connection between the criticism of the General Council and the Appellate Body's decision was inescapable, and was problematic for the independence of the Appellate Body.⁶⁷

Examples of direct conflict or interference between judicial and political organs of the same organizations may well be rare. However, the degree of control exercised by political organs over judicial bodies through financial and procedural mechanisms may be significant.

61. See generally DSU, *supra* note 13.

62. WTO Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, WTO Doc. WT/DS138/AB/R (May 10, 2000) [hereinafter *Hot-Rolled Lead*].

63. WTO Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001).

64. See WTO Appellate Body Communication, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/9 (Nov. 8, 2000) (informing Chairman of the Dispute Settlement Body of the additional procedure adopted pursuant to Rule 16(1) of the *Working Procedures for Appellate Review*).

65. See WTO Appellate Body Report, *Minutes of the Meeting of the General Council Held on 22 November 2000*, WTO Doc. WT/GC/M/60, (Jan. 23, 2001). See also Int'l Ctr. for Trade and Sustainable Dev., *Amicus Brief Storm Highlights WTO's Unease with External Transparency*, BRIDGES, Nov./Dec. 2000, at 1.

66. See *Hot-Rolled Lead*, *supra* note 62, ¶¶ 55–56.

67. See, e.g., *Contribution of the European Communities*, *supra* note 48, at 3. See also Steve Charnovitz, *Judicial Independence in the World Trade Organization*, in INTERNATIONAL ORGANIZATIONS AND INTERNATIONAL DISPUTE SETTLEMENT: TRENDS AND PROSPECTS 219 (Laurence Boisson de Chazournes et al. eds., 2002).

VIII. CONCLUSIONS

The issues considered in this Essay reflect some of the principal themes surrounding judicial independence of international courts and tribunals.⁶⁸ The potential research agenda is very broad, and in our view, the array of considerations flagged in this paper are worthy of further scholarly and professional consideration. The growing role of international courts and tribunals, and the accompanying issues of credibility, legitimacy and transparency merit a comprehensive review of standards of judicial independence and impartiality. The diversity of existing judicial bodies may warrant specialized approaches. Consideration of judicial independence issues must recognize diversity in terms of structure, subject matter, applicable law, parties and access, and resources across tribunals. Nonetheless, we suggest that it is both possible and desirable to identify certain common core guidelines for judicial independence applicable to all international judges, regardless of the tribunal on which they sit. Indeed, close scrutiny of existing relevant rules, guidelines, and practices may reveal that agreement on these core criteria already exists.

Moreover, the degree of public interest in the activities of international courts and tribunals requires a higher degree of transparency than has been apparent to date. Nomination review mechanisms, such as the Advisory Committee in the ICC Statute, offer a useful model and a starting point for further discussions in this area.

68. We should add that many similar issues arise in terms of the ethical standards applicable to the international bar, although that is beyond our remit here.

